IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-227

PHILLIP MORRIS, INC., *Petitioner*

v.

SECRETARY OF THE TREASURY OF THE COMMONWEALTH OF PUERTO RICO, *Respondent*

On Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Puerto Rico

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RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE COURT:

Now comes Respondent through its undersigned attorneys and respectfully prays that the Writ of Certiorari requested by Petitioner to review the opinion and judgment of the Supreme Court of the Commonwealth of Puerto Rico rendered in these proceedings on April 25, 1977, be denied.

OPINION BELOW AND PROCEDURAL BACKGROUND

The reference made to the Opinion of the Supreme Court of the Commonwealth of Puerto Rico on this case and to the facts as to the procedural background before the Commonwealth of Puerto Rico Courts, as stated by the Petitioner in its Petition for Writ of Certiorari, are correct and in order to avoid repetition we adopt them herein.

STATEMENT OF THE CASE

The petitioner, Phillip Morris, manufactures and packages cigarettes in Virginia and Kentucky. It also introduces and sells cigarettes of its's production in Puerto Rico under the name of "Phillip Morris de Puerto Rico". An excise tax is payable on cigarettes destined to Puerto Rico. The internal revenue stamps issued by the Secretary of the Treasury of the Commonwealth of Puerto Rico, at the times relevant in this case, were affixed to each package of such cigarettes as evidence of payment of such tax. Therefore, petitioner in the normal course of business purchased the internal revenue stamps in the office that the Treasury Department of the Commonwealth of Puerto Rico had at that time in the City of New York and affixed those stamps to the packages of cigarettes destined for Puerto Rico and delivered the shipment to the carrier.

The particular shipment of cigarettes involved in this case was stolen at a pier in Staten Island, New York, while pending shipment to Puerto Rico. New York police soon arrested some persons in the New York metropolitan area with some of the stolen cigarettes in their possession. A small percentage of the stolen cigarettes (2.269%) was recovered at the time of the arrests. The balance was never recovered neither

in New York City nor in any city of the United States. (Respondent Appendix, pp. 6 through 9).

No information was furnished to the Treasury Department of the Commonwealth of Puerto Rico or to its officials in New York City of the theft of the cigarettes and stamps. It was not until almost a year had elapsed from the date of the occurrence of the theft that the Secretary of the Treasury of Puerto Rico was informed of the theft. This was when Petitioner asked for the reissuance of new stamps or reimbursement of the taxes paid.[1] The Secretary of the Treasury of the Commonwealth of Puerto Rico refused to reissue new stamps or to reimburse the tax paid.

Petitioner filed an action in the Superior Court of Puerto Rico, San Juan, Part, requesting reimbursement of the taxes paid or reissuance of the internal revenue stamps. The Superior Court of Puerto Rico, based on a written stipulation of facts and a deposition offered by Petitioner, even though no evidence was presented on the issue, determined that the cigarettes had been stolen and disposed of by criminal elements in the New York Metropolitan area, (except for a small percentage, later destroyed, recovered by the New York Police). Based on that finding it held that the taxable event had not taken place and that respondent must reimburse petitioner for the tax paid, plus interest. (Petitioner Appendix pp. A-12 through A-18).

The Secretary of the Treasury petitioned the Supreme Court of Puerto Rico for Review. Respondent Appendix, pp. 1 through 17. Phillip Morris opposed.

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[1] The theft occurred on July 8, 1970 and the petition for reissuance of the internal revenue stamps or the reimbursement of their face vaule was made on May 4, 1971.

After an examination of the same evidence considered by the Superior Court, the Supreme Court of Puerto Rico issued a decision on April 25, 1977 reversing the trial court as to all but 2.269% of the amount claimed. The Supreme Court of Puerto Rico held as follows:

> "... In cases of theft where the possibility of the nonoccurrence of the taxable event cannot be eliminated, refund does not lie in the absence of an authorization. In the case at bar said possibility was eliminated only in regard to that part of the cigarettes destroyed by the New York police.
>
> There being no legislative authorization or case law rule to the contrary, we consider that the Secretary of the Treasury of Puerto Rico lacks the power to refund the complete face value of the stolen stamps." See Petitioner Appendix, pp. A-3 through A-4.

On May 9, 1977 Phillip Morris moved the Supreme Court of Puerto Rico to reconsider its decision, arguing for the first time that the decision allowed the Secretary of the Treasury to give extraterritorial effect to the Excise Act of Puerto Rico in violation of 26 U.S.C. § 7653 (a) (1) and 48 U.S.C. § 741 (a). Petitioner Appendix pp. A-20 through A-36. On May 19, 1977 the Supreme Court of Puerto Rico denied the motion for reconsideration. Petitioner Appendix p. A-37. On May 25, 1977 a second motion for reconsideration was filed by Petitioner, in which, likewise for the first time, it presented arguments based on due process, expressly relying on due process clauses of the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States of America. Petitioner Appendix pp. A-38 through A-41. The second motion for reconsideration was denied on June 9, 1977. Petitioner Appendix p. A-42. This petition followed.

JURISDICTION

The jurisdiction of this Court was invoked under 28 U.S.C., Sec. 1258 (3).

Said statute states that:

> "Final judgment or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court as follows:
>
> (1) .....
>
> (2) .....
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States."

The present form was given to said statute in 1961 in order to eliminate the right to appeal from the Supreme Court of the Commonwealth of Puerto Rico to the Court of Appeals for the First Circuit and to provide that final judgments and decrees entered by the Supreme Court of Puerto Rico shall be reviewed instead by the Supreme Court of the United States.

The Judicial Conference and the Department of Justice supported the passage of this legislation, recognizing that in cases involving a non-Federal question, the Court of Appeals for the First Circuit would not reverse the Supreme Court of Puerto Rico unless

the decision is "inescapably wrong" or "patently erroneous". 1961 *U.S. Code Congressional and Administrative News*, page 2449.

It has been held repeatedly that the Supreme Court of Puerto Rico should not be reversed in a matter of local law unless the court's determination is "inescapably wrong" or "patently erroneous". ***Sancho Bonet*** v. *Texas Co.*, 308 U.S. 463 (1940); ***De Castro*** v. ***Board of Commissioners***, 322 U.S. 451 (1944); ***C. Brewer P. R.*** v. ***Corchado***, 303 F. 2d 654 (1962); ***Acosta-Marrero*** v. ***Commonwealth of Puerto Rico***, 275 F. 2d 294 (1960); ***Fullana Corp.*** v. ***P. R. Planning Board***, 257 F. 2d 355 (1958); ***Marquez*** v. ***Avilés***, 252 F. 2d 715 (1958); ***Iglesias Acosta*** v. ***Secretary of Finance of Puerto Rico.***, 220 F. 2d 651 (1955); ***Sagastivelza*** v. ***P. R. Ins.***, 171 F. 2d 563 (1949); ***Compose*** v. ***Central Cambalache, Inc.***, 157 F. 2d 43 (1946).

This Court stated in ***Fornaris*** v. ***Ridge Tool Co.***, 400 U.S. 41 (1970) that:

> "The relations of the federal courts to Puerto Rico have raised delicate problems. It is a Spanish-speaking Commonwealth with a set of laws still impregnated with the Spanish tradition. Federal Courts, were inclined to construe Puerto Rican Laws in the Anglo-saxon tradition which often left little room for the overtones of Spanish culture. Out of that experience grew a pronouncement by this court that a Puerto Rican court should not be overruled on its construction of local law unless it could be said to be 'inescapably wrong'. See ***Bonet*** v. ***Texas, Co.***, 308 U.S. 463, 471." (See also ***Diaz González*** v. ***Colón González***, 536 F. 2d 453 (1976).

In order to properly invoke the jurisdiction of this Court, petitioners must present a substantial federal

question, not merely a frivolous or colorable one.[2] "It is not enough that a federal question be lurking in the record". ***Ramos*** v. ***Leahy***, 11 F. 2d 955 (1940). In the case at bar, notwithstanding petitioner's allegations, the only question before this Court is whether the Secretary of the Treasury of the Commonwealth of Puerto Rico, without legislative authorization to do so, can reimburse the face value of internal revenue stamps affixed to packages of cigarettes as evidence of payment of such tax, when those packages were allegedly stolen but where notice of the theft is made ten months thereafter, and there is no evidence of their destruction so that it could be established they could not be introduced, sold and used in Puerto Rico. Because the affixed stamps are the sole evidence of the payment of the tax such cigarettes would normally enter into Puerto Rico undetected. (For an explanation of the real character of the internal revenue stamps affixed to the stolen cigarettes, see Respondent Appendix pp. 5 through 6. We respectfully submit on the basis of the whole record of the case, that this clearly fails to constitute the federal question upon which this Court would have jurisdiction pursuant to 28 U.S.C. 1258 (3).

As it can be appreciated, no substantial federal question is involved in this case. But even assuming, arguendo, that the questions alleged were considered as federal questions, these were not timely raised below, since these were raised after the decision of the Supreme Court of the Commonwealth of Puerto Rico was entered. In other words these were presented before the

[2] See: ***Prensa Insular de P. R.*** v. ***People of P. R.***, 189 F. 2d 1019 (1951); ***Mercado*** v. ***Lluberas Pasarell***, 225 F. 2d 715, cert. den. 350 U. S. 936.

Supreme Court of Puerto Rico by way of two motions for reconsideration. Petitioner tries to justify its delay in raising those questions by arguing that up to that moment there had been no occasion to raise them because the statute and cases were favorable to its position. For the contrary, we consider that Petitioner had to raise those questions at the Superior Court of Puerto Rico for the following reasons: When the Secretary of the Treasury of Puerto Rico denied petitioner's request for reissuance of new stamps to replace the stolen ones, or reimbursement of the taxes paid, then and there originated the only controversy in this case. When Petitioner filed its action in the Superior Court of Puerto Rico was the appropriate moment to raise the questions lately presented because the effects of the decision of the Secretary of the Treasury denying its request are the same effects of the decision of the Supreme Court of Puerto Rico; with the only difference that the Secretary of the Treasury totally denied the reimbursement of the taxes paid or the reissuance of new stamps, and the Supreme Court denied only the reimbursement of the stamps affixed to the cigarettes that were not found and destroyed in New York City or any other city of the United States. As it can be appreciated, the most appropriate moment to raise the questions lately presented, was at the moment of the filing of the action in the Superior Court of Puerto Rico by Petitioner.

As this Honorable Court has held, when a constitutional question is not timely raised in state court proceeding, that question is not open in proceeding on petition for certiorari. *Ellis* v. *Dixon*, (1955) 349 U.S. 458, 99 L. ed. 1231, rehearing denied 350 U.S. 855, 100 L. ed. 759. *Flournoy* v. *Wiener*, 321 U.S. 253, 88 L. ed.

708 (1944). See also *Corretjer* v. *People of Puerto Rico*, 194 F. 2d 527 (1952); *Prensa Insular de Puerto Rico* v. *People of Puerto Rico*, 189 F. 2d 1019 (1951).

For the aforementioned reasons we respectfully submit that the certiorari here requested should be denied for lack of jurisdiction.

Nonetheless, the argumentation that follows will show that the decision of the Supreme Court of the Commonwealth of Puerto Rico on this case was not "inescapably wrong" or "patently erroneous", but correct.

REASONS FOR DENYING THE WRIT

The Decision of the Supreme Court of Puerto Rico Does Not Conflict With Any of This Court's Decisions

Petitioner argues that the decision of the Supreme Court of Puerto Rico is in conflict with this Court's decisions in *Cleveland Board of Education* v. *La Fleur*, 414 U.S. 632 (1974); *U.S. Department of Agriculture* v. *Murry*, 413 U.S. 508 (1973); *Vlandis* v. *Kline*, 412 U.S. 441 (1973); *Stanley* v. *Illinois*, 405 U.S. 645 (1972).

Petitioner also avers that the decision below conflicts with this Court's decisions in *Leary* v. *United States*, 395 U.S. 6 (1969); *Turner* v. *United States*, 396 U.S. 398, reh. den., 397 U.S. 958 (1970); *Tot* v. *United States*, 319 U.S. 463 (1943); *United States* v. *Romano*, 382 U.S. 136 (1965); *Carrington* v. *Rash*, 380 U.S. 89 (1965).

We respectfully consider that the decision in the instant case is not in conflict with any of the two groups

of cases cited by Petitioner because the case at bar is completely different from them.

First of all, both groups of cases to which Petitioner refers, supra, deal with statutory dispositions creating irrebutable and rebutable presumptions. On the other hand, in the case at bar the Supreme Court of Puerto Rico was faced with the problem that there is not in Puerto Rico a legislative authorization for the refunding of taxes in cases of theft of taxable articles when the internal revenue stamps have been affixed to them as evidence of the payment of the taxes required. Consequently, that Court had to balance the equities or consider as a background, how this problem has been handled in the continental United States, in view of the similarity with regard to that matter between Puerto Rican tax legislation and that of the United States prior to 1954. It found that in 1954 the Code of Internal Revenue of the United States was amended to expressly prohibit the refund of taxes in cases of theft.[3] See Petitioner Appendix, pp. A-2 through A-3. After an extensive analysis of the Federal legislation, the rule of the federal courts on that matter, and the scope of its decision in *Ligget & Myers Tobacco Co. Inc.* v. *Buscaglia*,[4] the Supreme Court of Puerto Rico found that the Secretary of the Treasury of the Commonwealth of Puerto Rico lacks the power to refund the complete face value of the stolen stamps which were affixed to the stolen cigarettes, because the possibility of their introduction to Puerto Rico could not be eliminated. In other words, since the internal revenue stamps of the Commonwealth of Puerto Rico were affixed to the packages of cigarettes as evidence of pay-

[3] 26 U.S.C. 5705 (a).

[4] 64 P.R.R. 75 (1944).

ment of the tax, those cigarettes could be introduced, used and sold in Puerto Rico by any person at any time with no problem.[5] Contrary to the contention of Petitioner in the sense that the ruling of the case at bar creates an irrebutable presumptions, our position is that it does not create any irrebutable or rebutable presumption.

In the case at bar, Petitioner could have informed the Secretary of the Treasury of the Commonwealth of Puerto Rico, its officials in the City of New York, the Customs Service in Puerto Rico or the Police Department of Puerto Rico immediately after the occurrence of the theft. At that time many things could have been made to eliminate the possibility that the stolen cigarettes with the internal revenue stamps affixed to them were introduced in Puerto Rico. For example, as Petitioner and the New York office of the Department of the Treasury had the serial number of the internal revenue stamps, that serial number could have been given immediately to the internal revenue and customs service officials assigned to the airports and ports stations in Puerto Rico. In that way the cigarettes with the stamps could have been detected and confiscated when an attempt was made to introduce them into Puerto Rico. But Petitioner didn't do that. On the contrary, it was not until almost a year has elapsed from the date of the theft that it informed the Secretary of the Treasury of that theft. When petitioner requested the reissuance of the internal revenue stamps in controversy or the reimbursement of their face value it was too late for any preventive action by the Secretary of the Treasury.

[5] For an explanation of the internal revenue stamps characteristics see Respondent Appendix, pp. 5 through 10.

The decision in the instance case does not require a taxpayer, in Petitioner's position to prove that merchandise stolen in New York, with the Commonwealth of Puerto Rico internal revenue stamps affixed to it as evidence of the taxes, was not introduced to Puerto Rico. What is required to a taxpayer in that position is to be as diligent as possible so as to place the pertinent authorities in such a position as to eliminate or reduce the possibilities for the introduction into Puerto Rico of that merchandise.

The decision below not only does not require a taxpayer the kind of proof above mentioned, but it is also a liberal interpretation, favorable to Petitioner, of the Commonwealth of Puerto Rico Excise Tax dispositions, since it ordered the reimbursement of the face value of the internal revenue stamps affixed to the cigarettes destroyed by the Police Department of New York City, even when it was not made under the supervision of any representative of the Secretary of the Treasury of the Commonwealth of Puerto Rico. Section 27 (d) of that Act [6] provided as follows at the times relevant in this case.

> "(d) *Reissuance of Stamps in Certain Circumstances.* Cigarettes which, after having been withdrawn from the factories, or from piers, airports or other terminals, are taken away from the market as being unsuitable for normal consumptions, *may be destroyed under the supervision of the Secretary,* who shall be authorized to reissue new stamps to the introducer or manufacturer who originally paid the taxes, provided he claims same within a year from the date of the payment." (Emphasis added)

[6] 13 L.P.R.A. 4027 (d).

Apparently the Supreme Court of the Commonwealth of Puerto Rico considered the destruction of the cigarettes under the supervision of the Police Department of New York City as equally satisfactory, following the standards for cases of losses in major disasters. See 26 U.S.C.A. 5708(d); and 13 L.P.R.A. 1929 (e).

Otherwise, even assuming, *arguendo*, that by the decision in the instance case there is affected a petitioner's protected interest, an important public interest is also affected. That public interest is that there should not be a reissuance of internal revenue stamps or reimbursement of the face value of those stamps unless there is substantial proof of their destruction. As it has been pointed by the Court, the due process standards applicable to a particular protected interest depend upon the interest affected and the circumstances of the alleged deprivation. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 6 L. ed. 2d. 1213 (1961). If the case at bar is examined in light of the aforementioned rule, the equities have to be balanced. Who should suffer the loss? Should it be the Petitioner, who incurred in negligence or laches when it delayed for ten months the notice to the pertinent authorities of the theft of the merchandise that was under its responsibility, or the Commonwealth of Puerto Rico, that was not given the opportunity by petitioner to eliminate or minimize the possibility of the importation into Puerto Rico of the stolen merchandise with the internal revenue stamps? Obviously, equities should be balanced in favor of the Commonwealth of Puerto Rico.

The Decision Below Does Not Give Extra-Territorial Effect to the Laws of Puerto Rico

Petitioner claims that the decision below gives extra-territorial effect to the tax laws of Puerto Rico.

As it was pointed by the Honorable Justice Douglas in *McLeod* v. *Dilworth Co.*, 322 U.S. 327, 335 (1944): "If there is a taxable event within the State of the buyer, I would make the result under the Commerce Clause *turn on practical considerations and business realities rather than on dialectics*". (Emphasis added) Aside that the Commerce Clause is not in force in the Commonwealth of Puerto Rico, our Supreme Court has also followed the aforementioned principle in *R.C.A.* v. *Govt. of the Capital*, 91 P.R.R. 404, 426 (1964) when it expressed as follows: "The controversies appertaining to the State's taxing power must be examined and decided on the basis of fundamentally practical considerations." The facts of the instance case were examined following those practical considerations and business realities, especially the continuous transit of people and the continuous traffic of merchandise between Puerto Rico and New York City.

The cases to which Petitioner refers [7] are inapplicable to the situation faced in the case at bar, since no stolen merchandise with internal revenue stamps already affixed to it as evidence of payment of the tax on cigarettes was in controversy in any of those cases. The principal question raised in those cases is whether or not a State can reach out-of-state normal business transactions. This Honorable Court has ruled on that regard that when a tax is imposed on an out-of-state transaction or taxpayer there should be a nexus between the taxing State and the taxpayer; and there should be some definite link, some minimum connection

[7] *American Oil Co.* v. *Neill*, 380 U.S. 451 (1965); *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340 (1954); *Norton Co.* v. *Department of Revenue*, 340 U.S. 534 (1951); *McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327 (1944).

between a State and the person, property or transaction it seeks to tax.[8] This doctrine is inspired on the Congress purpose of avoiding the multiple taxing of interstate transactions,[9] since the very aim of the Commerce Clause was to create an area of free trade among the several states. Nonetheless this Honorable Court has expressed that "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business."[10] This Court, since 1943 held, for example, that the State of Iowa could collect from a Minnesota corporation, with no office in Iowa, a use tax on the basis of property bought from that corporation and sent by it from Minnesota to purchasers in Iowa for use in Iowa. Iowa Code ruled on its § 6943.112 that the use tax constituted a debt owed by the retailer (in that case the Minnesota corporation) to Iowa. And more recently in *General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964) this Court has approved a tax imposed by a nondomiciliary State to a nondomiciliary corporation, measured by its gross wholesale sales.

In the case at bar, there is a nexus between Petitioner and the Commonwealth of Puerto Rico since Petitioner makes business in the Commonwealth of Puerto Rico as "Phillip Morris de Puerto Rico" and receives all the benefits and protection of its laws and institutions. And the internal revenue stamps of the Common-

[8] 380 U.S. 458.

[9] *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954).

[10] *Western Line Stock* v. *Bureau of Revenue*, 303 U.S. 250, 254 (1938).

wealth of Puerto Rico already affixed to the cigarettes packages as evidence of the payment of the tax on merchandise destined to Puerto Rico, is a definite link or a minimum connection between the Commonwealth of Puerto Rico and the transaction in controversy. See Respondent Appendix, pp. 5 through 10.

The Decision Below Does Not Conflict With the Federal Supremacy Clause of the Constitution of the United States, "The Compact" Between the Congress of the United States and the People of Puerto Rico or With Any Federal Law Applicable to the Commonwealth of Puerto Rico

The decision in the instance case does not retard, impede or burden any federal function, property or law. For that reason such decision is not in conflict with the Federal Supremacy Clause of the Constitution of the United States. In *United States* v. *Country of Fresno,* 429 U.S. 452 (1977), where this Honorable Court upheld a property tax imposed by the State of California to federal employees on their possessory interests in housing owned and supplied to them by the Federal Government as part of their compensation, there is a review of the interpretative evaluation by this Court of the Supremacy Clause of the Constitution of the United States. That decision demonstrates, as well as the decision in the instance case, that each situation or problem has to be examined and solved in light of the applicable law, the circumstances in which that law has to be enforced and the specific facts of the problem.

The instance case is not in conflict with any federal statute applicable to the Commonwealth of Puerto Rico or with the "Compact" between the Congress of the United States and the People of Puerto Rico.

It only represents a realistic application of the Excise Act of Puerto Rico, taking in consideration, as a background, how this problem has been handled in the United States. Supra pp. 10 through 14.

The Decision Below Does Not Affect the Taxation Power of the States of the United States

Petitioner finally argues that if the decision below is allowed to stand, it would encourage each State to attempt to tax any commodity destined for shipment to that State irrespective of whether the commodity was in fact ever introduced into the commerce of that state. This is a mere conjecture that we deem it is not necessary even to comment, since a constitutional question, as well as a request for damages should not be based on speculations and conjectures.[11] Nevertheless, contrary to the States of the United States, where the internal revenue laws of the United States are applicable, and where their taxing power is limited by the Commerce Clause, in the Comonwealth of Puerto Rico there is not in force any of those laws.[12]

As it has been pointed by the Supreme Court of Puerto Rico in *R.C.A.* v. *Govt. of the Capital,* supra:

> "Naturally, in the past, as at present, there has been interstate commerce relation between Puerto Rico and the United States, but that relation existed by express provisions of Congress in the exercise of its authority under subd. 2, § 3, Art. IV of the Federal Constitution and at present under Act No. 600. This interstate commerce relation has

[11] *Locklin* v. *Day-Glo Color Corp.,* 429 F 2d 873; cert. denied 400 U.S. 1020 (1971); *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251 (1946).

[12] *R.C.A.* v. *Govt. of the Capital,* 91 P.R.R. 404, 418 (1964).

constitutionally had, and still has, contours which are different from the relation which under the Constitution prevails among the States of the Union. That is why even under the former systems Puerto Rico was able to exercise the taxing power, and the Commonwealth may exercise that power at present respecting interstate commerce in a manner that perhaps it would not be permissible to a state covered by the provisions of the Federal Constitution." 91 P.R.R. 419 (Citations omitted)

CONCLUSION

Inasmuch as there is not involved any federal question on this case and, since the determination of the Supreme Court of Puerto Rico is not inescapably wrong or patently erroneous, the writ of certiorari should be denied.

Respectfully submitted.

In San Juan, Puerto Rico, this 12 day of October, 1977.

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APPENDIX

IN THE SUPREME COURT OF PUERTO RICO

REVIEW

PHILIP MORRIS, INC., *Plaintiff-appellee*

v.

SECRETARY OF THE TREASURY OF PUERTO RICO, *Defendant-appellant*

Petition for Review

TO THE HONORABLE COURT:

Comes now the Secretary of the Treasury represented by the Solicitor General of Puerto Rico and very respectfully states and prays:

JURISDICTIONAL GROUND

The jurisdiction here invoked is that conferred upon this Honorable Court by Section 14(b) of the Judiciary Act of the Commonwealth of Puerto Rico, 4 L.P.R.A. § 37(b), and by Rule 53.1 (b) of the Rules of Civil Procedures.

JUDGMENT WHOSE REVIEW IS SOUGHT

We hereby request review of the judgment rendered by the Superior Court, San Juan Part, on August 25, 1976 in *Philip Morris, Inc.* v. *Secretary of the Treasury,* Civil No. 75-1200. A copy of the notice of the judgment was entered in the record on September 3, 1976.

STATEMENT OF FACTS

On February 25, 1975, 19 days after receiving the Secretary of the Treasury's notice denying its petition for refund, plaintiff, Philip Morris, Inc., filed a complaint in the Superior Court, San Juan Part.[1] In said complaint plaintiff requested the trial court to order the Secretary of the

[1] Included as Exhibit I.

Treasury to refund the taxes paid on the cigarettes which it alleged had been stolen in the State of New York.

On March 25, 1975, the Secretary of the Treasury answered the complaint admitting that he had denied plaintiff's petition for refund and denying other allegations made in the complaint.[2]

On May 8, 1975 the Secretary of the Treasury submitted to plaintiff a "Requirement of Admissions of Facts and Interrogatories."

On May 16, 1975 plaintiff filed an Opposition to Requirement of Admissions of Facts and Interrogatory.

On May 23, 1975 the trial court issued on Order regarding the "Opposition to Requirement of Admissions of Facts and Interrogatory" relieving plaintiff from answering some interrogatories and ordering it to answer others.

On June 6, 1975 plaintiff filed a "Motion on the Taking of the Deposition of Plaintiff's Witness," Mr. David Hall, detective of the New York City Police Department to be taken in Puerto Rico. Later, on June 14, 1976 plaintiff filed a "Motion Requesting a Committee for the Taking of a Deposition in the United States."

On June 16, 1976 the trial court entered an order providing measures for the taking of Mr. David Hall's deposition.

On June 30, 1975 plaintiff filed an "Answer to Interrogatories."

On October 16, 1975 plaintiff filed a "Motion Filing the Original of the Deposition."

On March 24, 1976, the parties submitted the case to the consideration of the trial court through a stipulation of facts[3] filed on that same date, the deposition of detective

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[2] Included as Exhibit II.

[3] Included as Exhibit III.

David Hall[4] and the memorandum of the parties, for the filing of which they requested a term of 30 days.

On April 1, 1976 the trial court accepted the parties' stipulation of facts.

On May 20, 1976 plaintiff filed its brief. It alleged, in synthesis, that since the taxable event had not taken place with regard to the stolen cigarettes it was proper to grant the refund requested or the reissuance of the internal revenue stamps.

On May 21, 1976, defendant, the Secretary of the Treasury, filed his brief, alleging, in short, that the taxable event in the case of cigarettes occurs when the stamps are purchased and not when they are introduced [in the island] and that the process of destructing the stamps in order to reissue new ones was not carried out according to the applicable provisions of law.

On June 2, 1976 defendant filed a "Memorandum for Reply" adding that it had not been established that the cigarettes and stamps in controversy had not been imported or introduced into Puerto Rico, and that the legal provisions concerning the reissuance of internal revenue stamps or the refund of their value should be restrictively construed due to the transferable nature of the said stamps.

No oral evidence was presented.

Finally, on August 25, 1976 the trial court rendered judgment[5] sustaining the complaint filed by Philip Morris, Inc. and ordered defendant to refund plaintiff the sum of $98,280.00 plus interest.

Feeling aggrieved with the judgment rendered, we appeal before this Honorable Court by way of a petition for review and assign the following errors:

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[4] Included as Exhibit IV.

[5] Included as Exhibit V.

First Error

The trial court erred when it determined that the cigarettes and the internal revenue stamps of the Commonwealth of Puerto Rico affixed to them did not leave the New York City metropolitan area and that they had not reached Puerto Rico nor were introduced into the island.

Second Error

The trial court erred upon concluding that Article 27 (d) of the Excise Act of Puerto Rico (13 L.P.R.A. § 4027(d)) is applicable only after the cigarettes are introduced into Puerto Rico.

Third Error

Since we are dealing with an alleged loss and with the recovery thereof, the trial court erred upon not taking into consideration whether plaintiff-appellee had been totally or partly indemnified by the insurance company which covered the loss allegedly sustained.

ARGUMENTS OF THE ERRORS ASSIGNED

First Error

Our first contention is that the trial court erred when it concluded that the cigarettes and the Puerto Rico internal revenue stamps affixed to them and allegedly stolen in New York City did not leave said city's metropolitan area nor were they introduced into Puerto Rico.

In arguing this error, we wish, first of all, to direct the attention of this Honorable Court to the following fact: That once acquired from the Treasury Department, the internal revenue stamps which had to be affixed to the cigarette packs and cartons at the time of the events here in

controversy,[6] are similar in nature to a negotiable instrument. That is to say, that after said stamps were purchased from the representative of the Secretary of the Treasury of the Commonwealth of Puerto Rico in New York, the supervision of the Department of the Treasury with regard to said stamps and their use ceased there, since there was no way of requiring, verifying, or proving that said stamps would be in effect affixed to a pack of a determined brand of cigarettes or that it would be done by a specific manufacturer. In other words, due to its nature and configuration the stamp could be transferred or used by a person or entity other than the one who acquired it. The only supervision exercised by the Secretary of the Treasury after said stamps were sold was limited to verify whether or not the packs or cartons of cigarettes introduced into, sold, or used in Puerto Rico had the internal revenue stamp affixed evincing the payment of the tax, but he had no manner of distinguishing some stamps from others. That is to say, that when the cigarettes bearing the Puerto Rico internal revenue stamps were introduced into the island it was impossible to verify whether or not the person who introduced, sold, or used them was the same one who paid the tax; payment which was already evinced by the stamp affixed. That situation facilitated the introduction of cigarettes as those of the instant case without any problem whatsoever.

Going into the specific facts of the present case, we have that plaintiff-appellee alleged that a total of seven million five hundred sixty thousand (7,560,000) cigarettes[7] were

[6] Act No. 8 approved October 17, 1975 amended the Excise Act of Puerto Rico in order to eliminate the use of internal revenue stamps for the payment of taxes on cigarettes. From the date of effectiveness of said Act the system to levy and collect taxes on cigarettes is similar to that established by the Tax Act for other taxable articles.

[7] These cigarettes requires about 459,000 internal revenue stamps. The stamps for the 20-cigarette-packs were worth 26 cents and those for the 10-cigarette-packs were worth 13 cents.

stolen, of which 5,940,000 were packed in twenty-cigarette-packs and 1,620,000 in ten-cigarette-packs, all bearing the corresponding internal revenue stamps.

From the total of 7,560,000 cigarettes, 1,716 packs were recovered. From detective David Hall's deposition, at page 22, lines 2 to 5, it comes forth that most of the packs recovered in the city of New York were ten-cigarette-packs. So assuming that half of the packs recovered were those containing ten cigarettes, this would amount to a total of only 25,740 cigarettes. The other cigarettes, that is, approximately seven million five hundred thirty four thousand two hundred sixty (7,543,260) [sic] were not found in New York City nor in any other city of New York State or in any other state of the United States.

Based on the stipulated facts, the memorandum of the parties and the deposition of detective Hall, the trial court determined that: "The cigarettes which plaintiff owned and which were stolen, were lost in the city of New York, did not leave the metropolitan area of said city and did not reach nor were introduced into Puerto Rico." (See finding of fact No. 22 and conclusion of law No. 9 of the judgment appealed from.)

Considering the foregoing conclusion, the trial court proceeded to apply to the facts of this case the decision in *Ligget & Myers Tobacco Co., Inc.* v. *Buscaglia.*[8]

But the facts in *Ligget & Myers Tobacco Co., Inc.* v. *Buscaglia,* supra, are different from those of this case, since in the former no other conclusion could be reached but that the cigarettes in question could not reach Puerto Rico, since the steamer which brought them was sunk in the ocean. It was absolutely impossible to introduce, sell or use the cigarettes in Puerto Rico.

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[8] 64 P.R.R. 75 (1944).

In the present case the cigarettes were stolen, and from a total of 7,560,000 cigarettes packed and bearing the stamps only 1,716 were recovered and destroyed by the New York police, but there was no representative of the Secretary of the Treasury present at said act as required by the applicable law. The difference, some 7,534,260 cigarettes, as we mentioned before, were not found in New York City nor in any other area of New York State or in any other State. That is, that in view of the fact that the packs bore the internal revenue stamps of the Commonwealth of Puerto Rico; that they did not bear a New York State tax stamp, that those who stole the cigarettes were being persecuted by the police in New York City, since it was there where they stole the van; and that they could introduce them into Puerto Rico with less problems than those they would have selling them in another state and with a substantially greater profit, there are great probabilities that said cigarettes were introduced into Puerto Rico.

And as the trial court stated at page 18 of the judgment: "The party who has the burden of persuasion must induce the judge to believe that the existence of the facts he asserts is more probable than the nonexistence of the same."

We understand that the probability that said cigarettes were introduced into Puerto Rico is greater than the probability that they did not leave New York or that they were not introduced into Puerto Rico, particularly when detective Hall himself indicated in his testimony that the packs recovered in New York City were mainly those containing ten cigarettes. The small amount of cigarettes recovered in New York, as compared with the total amount stolen, is another indication that almost all the cigarettes were taken outside New York and that the most tempting place to introduce them was Puerto Rico, because they already bore the internal revenue stamps, making their introduction easier and because it was the place where their sale would yield the greatest financial benefits.

We know that a litigant may prove his case through indirect evidence.[9] But this Honorable Court has held that "the circumstances shown by the evidence *should be sufficiently strong that the trial court might properly, on the grounds of probability existing in the case, exclude inferences favorable to the defendant.*" [10] (Emphasis supplied.)

Therefore, we consider that the logical inference derived from the proven facts to which we have already referred, is that the cigarettes bearing the Commonwealth of Puerto Rico internal revenue stamps were or could have been introduced into Puerto Rico. That inference is more probable than the inference that they did not leave the New York City metropolitan area and that they were not introduced into Puerto Rico.

Besides, since this is a case involving a loss of property by theft, we must point out that the tendency in other jurisdictions,[11] is that of not allowing refund in cases of theft or robbery. For that reason, the trial court should have construed restrictively the right to refund requested by plaintiff-appellee.

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[9] *Murcelo* v. *H. I. Hettinger & Co.*, 92 P.R.R. 398 (1965); *Rodríguez* v. *Ponce Cement Corp.*, 98 P.R.R. 196 (1969).

[10] *Widow of Delgado* v. *Boston Ins. Co.*, 99 P.R.R. 693, 702 (1971).

[11] In the federal jurisdiction, the law governing this matter provides as follows:

> "(a) Credit or refund.—Credit or refund of any tax imposed by this chapter or section 7652 shall be allowed or made (without interest) to the manufacturer, importer, or export warehouse proprietor, on proof satisfactory to the Secretary or his delegate that the claimant manufacturer, importer, or export warehouse proprietor has paid the tax on tobacco products and cigarette papers and tubes withdrawn by him from the market; or on such articles lost (otherwise than by theft) or destroyed, by fire, casualty, or act of God, while in the possession or ownership of the claimant". (26 U.S.C.A. 5705).

And even if the issue in controversy was liberally interpreted in favor of plaintiff-appellee, if any refund lies it would be with regard to the stamps affixed to the cigarette packs allegedly destroyed by the New York police, since those are the only ones of which there is a reasonable certainty that were not introduced into Puerto Rico. But even with regard to those cigarettes and stamps, the proceeding established by the provisions in force at the time when they were allegedly destroyed were not followed,[12] since an officer of the Department of the Treasury was not present to supervise their destruction. This leads us to argue the second error assigned.

Second Error

We maintain that the trial court erred upon concluding that Article 27(d) of the Excise Act of Puerto Rico (13 L.P.R.A. § 4027(d)) applies only after the cigarettes have already been introduced into Puerto Rico.

As of said date said article provided the following:

> "(d) *Reissuance of Stamps in Certain Circumstances.* Cigarettes which, after having been withdrawn from the factories, or from piers, airports or other terminals, are taken away from the market as being unsuitable for normal consumption, *may be destroyed under the supervision of the Secretary, who shall be authorized to reissue new stamps to the introducer or manufacturer who originally paid the taxes*, provided he claims same within a year from the date of the payment".[13] (Underscore supplied.)

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[12] The exact date on which they were destroyed does not appear from the evidence. Mention is made to: after 90 days. (See finding of fact No. 18 of the judgment appealed from.) We assume that it was at the end of 1970.

[13] 13 L.P.R.A. § 4027(d).

The purpose of the aforecited provision is that before the Secretary of the Treasury reissues new stamps he must be absolutely sure that the internal revenue stamps affixed to the cigarettes found unsuitable for normal consumption are actually destroyed. Therefore, the lawmaker provided measures in order that said destruction be made under the supervision of the Secretary of the Treasury before new stamps are reissued to substitute those destroyed. As we can see, the lawmaker does not establish the limitation fixed by the trial court. It is an acknowledged rule that where the lawmaker does not impose limitation, the courts should not do so either. And much less when the legal provision involved is one vested with a high public interest and inspired in the legislative intent to guarantee to the government that it would not reissue some internal revenue stamps of whose destruction it has not ascertained, or in other words, that it would refund a tax without ascertaining that the taxpayer is entitled to it.

In the instant case the cigarettes had left the factory with the stamps already affixed, stamps which Phillip Morris Co. Inc. had purchased from the representative of the Secretary of the Treasury in New York. Consequently, when the cigarettes allegedly destroyed in New York were withdrawn from the market, the proceeding established in the aforecited act had to be followed in order for plaintiff-appellee to be entitled to the reissuance of new stamps.

This case is also different in this respect from *Liggett & Myers Tobacco Co. Inc., supra,* since in the latter there were no cigarettes or stamps to destroy since they had sunk in the ocean, and in this case there were cigarettes to be destroyed, but the proceeding established by law was not followed.

Since the alleged destruction of the cigarettes and stamps was carried out in New York City, it would have been very easy for a representative of the Secretary of the Treasury in the New York Office, to supervise the destruction of the

same, if it had been requested. But nobody was summoned to supervise the destruction, and it was not until nearly a year after the alleged theft, on May 4, 1971, that the Secretary of the Treasury learned of the incidents of the case when plaintiff-appellee filed a petition for refund before the Department of the Treasury, as it appears from the complaint.

Third Error

We maintain that the trial court erred upon not taking into consideration, before deciding whether or not the refund of the taxes paid was proper, if plaintiff-appellee had been totally or partly indemnified by the insurance company which covers the loss allegedly sustained. By failing to do so, and by ordering the refund, the trial court was propitiating a double indemnity for plaintiff-appelle, that is, that plaintiff would be twice indemnified for an economic loss, thing which was severely censured by this Honorable Court in the decision of *Futurama Import Corp. and Isaac Menda* v. *Trans Caribbean Airways.*[14]

An argument against this assignment of error could be that said question was not raised before the trial court. But we all know, since it is a well-known fact that companies engaged in large-scale business, as plaintiff-appellee Philip Morris Co., Inc., have insurance policies to cover the risks they may face in their different business transactions, particularly when such valuable cargoes as those of cigarettes bearing internal revenue stamps are involved. It is also a well-known fact that van transportation companies, as the one involved in this case, Transamerican Trailer Transport (TTT), have insurance covering this type of risks.

Since the foregoing is a widely known fact the trial court could have taken judicial notice of the fact that plaintiff-

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[14] Per Curiam opinion of January 30, 1976, Adv. Sheet Bar Asso. 1976-16.

appellee, Philip Morris Co. Inc., had insured the cigarette shipment against risk of loss.

This Honorable Court has repeatedly held that "Without need of evidence to that effect, courts shall take judicital notice of facts which are matters of common knowledge, notorious and unquestionable." [15] And many years ago it stated that "[t]he loose language of our local Law of Evidence should not be strictly construed. It merely indicates the general lines along which the power of judicial notice may be exercised. It does not limit the range or the scope of that power which is inherent in every court of justice, but points the way to a wide field of usefulness wherein that power may be utilized at will as an effective aid to the simplification of procedure and to the practical administration of substantial justice." [16]

If the trial court had taken judicial notice of the fact that plaintiff-appellee had insured the loss allegedly sustained, this would not preclude the parties from raising the contentions they wished to present. For, citing Wigmore,[17] this Honorable Court has pointed out that "a matter judicially noticed merely means that it is taken as true without the offering of evidence by the party who ordinarily should have done so; that this is so because the court assumes that the matter is so notorious that it will not be disputed; *but that the opponent is not barred from contradicting the matter by evidence, if he believes it disputable.*" [18] (Underscore supplied.)

Since the controversy centers on an alleged loss and the recovery thereof, the trial court should have taken judicial

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[15] *Lluberas* v. *Mario Mercado e Hijos*, 75 P.R.R. 7 (1953); *Widow of Delgado* v. *Boston Insurance Co.*, 99 P.R.R. 693 (1971).

[16] *Silva* v. *Carbonell*, 35 P.R.R. 224, 232 (1926).

[17] IX [Wigmore], 3d ed. at 535, § 2567.

[18] *Lluberas* v. *Mario Mercado e Hijos, Ibid.*

notice that there was an insurance company covering said risk, it should have informed the parties that it had taken judicial notice of said fact and it should have given them the opportunity to rebut or accept it. It was proper to take judicial notice of said fact, since as one of the members of this Honorable Court very well stated "when there are insurances, the loss should fall on the insurer and stop there, since the insurance companies are those which are precisely in the business of insuring risks and are the distributors of risks par excellence." [19]

Since this case involves such an important public interest as is the collection and refund of taxes, which affects the general interest of the society in which we live, and which is consequently vested with a high public interest, there is no reason to justify the trial court's failure to take judicial notice of the aforestated fact. By failing to do so, the court was propitiating a double compensation for plaintiff-appellee which "is really an irrational rule. To collect a debt more than once contradicts the good sense of justice, and at the social level, it results in an additional cost for the society which pays it." [20]

In short, the juudgment rendered by the trial court is inclined to injustice, first, because plaintiff-appellee may receive a double compensation for the same loss and also because the people of Puerto Rico would have to refund some taxes on a merchandise which logically must have been introduced, sold, and used in Puerto Rico.

WHEREFORE, the Solicitor General very respectfully requests that the writ requested be issued and that following the corresponding legal proceedings the judgment rendered in this case against the Secretary of the Treasury be reversed.

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[19] *Futurama Import Corp. and Isaac Menda* v. *Trans Caribbean Airways, Ibid.* Concurring opinion of Mr. Justice Rigau.

[20] *Ibid.*

San Juan, Puerto Rico, this 4th day of October 1976.

/s/ Roberto Armstrong, Jr.
Roberto Armstrong, Jr.
Acting Solicitor General

/s/ Reina Colón de Rodriguez
Reina Colón de Rodriguez
Assistant Solicitor General

Notice

I Certify: That today I have served by mail a copy of the foregoing Petition to Goldman, Antonetti, Barreto, Curbelo & Dávila, to their address, Post Office Box 13486, Santurce, Puerto Rico 00908.

San Juan, Puerto Rico, this 4th day of October 1976.

/s/ Reina Colón de Rodriguez
Reina Colón de Rodriguez
Assistant Solicitor General
Department of Justice
Box 192
San Juan, Puerto Rico 00902
Tel. 724-1991

Chief Clerk's Certificate

I, Ernesto L. Chiesa, Chief Clerk of the Supreme Court of Puerto Rico, Do Hereby Certify:

That the foregoing is a true and faithful translation from Spanish into English of the Petition for Review of October 4, 1976 which is part of the record in case No. R-76-338, *Philip Morris, Inc.* v. *Secretary of the Treasury of Puerto Rico.*

In Witness Whereof and at the request of the Office of the Solicitor General of Puerto Rico, I issue these presents for official use, free of charge, under my hand and the seal of this Court in San Juan, Puerto Rico, this 22th day of September 1977.

/s/ Ernesto L. Chiesa
Chief Clerk
Supreme Court of Puerto Rico